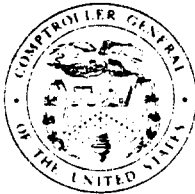


DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

FILE: B-185134

DATE: FEB 2 1976

MATTER OF: Department of Defense Military Pay
and Allowance Committee Submission
No. DO-N-1242

DIGEST: Where retired member waived his retired pay to receive Veterans Administration compensation but informed Civil Service Commission that purpose of such waiver was to have his Civil Service annuity computed on basis of his total Federal service, we must conclude that member waived his retired pay for purposes of increasing his Civil Service annuity (pursuant to subchapter III of chapter 83 of title 5, United States Code) even though Navy was not so advised until after member's death. Accordingly, his widow is not eligible for Survivor Benefit Plan annuity, however, she is entitled to all such costs remitted by member.

This action is in response to a letter dated September 5, 1975, with enclosures (file reference XO:AAF:blf 722 07 5737), from Mr. A. E. Emde, Disbursing Officer, Retired Pay Department, Navy Finance Center, Cleveland, Ohio, requesting an advance decision concerning the propriety of making payment of a survivor annuity under the Survivor Benefit Plan (SBP), 10 U. S. C. 1447-1455 (Supp. II, 1972), to Mrs. Mary H. Whaley as widow of Chief Boilerman Leslie H. Whaley, USN, Retired, SSAN 722 07 5737, in the circumstances described. That letter was forwarded to our Office by endorsement dated October 7, 1975 (file reference NCF-411 7220/6-5), from the Navy Accounting and Finance Center and assigned submission number DO-N-1242 by the Department of Defense Military Pay and Allowance Committee.

In the submission it is stated that effective October 1, 1959, after having completed more than 30 years' active service, the member was placed on the Temporary Disability Retired List with a disability rated at 60 percent and that on June 1, 1964, he was permanently retired with a disability rating of 60 percent. In order to receive greater disability compensation payments from the Veterans Administration, the member waived his retired pay in its entirety on March 1, 1970, under the provisions of

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38 U.S.C. 3105 (1970), and such waiver remained in effect until his death on December 4, 1973. The submission further states that on February 9, 1970, the United States Civil Service Commission requested verification of the member's retired pay status because he had applied for Civil Service retirement benefits and on March 12, 1970, the Navy Finance Center certified that for disability reasons the member had been awarded retired pay effective October 1, 1959, but such pay had been totally waived effective March 1, 1970.

The record shows that on October 3, 1972, the member made an SBP election pursuant to the provisions of section 3(b) of Public Law 92-425, approved September 21, 1972, 86 Stat. 706, 711, to provide an annuity for his surviving spouse. Since the member was not in receipt of retired pay due to the before-mentioned waiver, as required by 10 U.S.C. 1452(d) he submitted personal remittances to the Navy Finance Center for the cost of the SBP annuity for the period November 1, 1972, through December 31, 1973.

The submission states that following the member's death on December 4, 1973, appropriate claim forms were forwarded to his widow for completion in order that she could receive the annuity payable under the SBP as well as the arrears of retired pay due from December 1 through December 4, 1973. In response, the Navy Finance Center was informed by the member's daughter that he had been in receipt of Civil Service annuity payments prior to his death and his widow had chosen to receive the Civil Service survivor annuity based on the member's total years of Federal service in lieu of the SBP annuity. In view of that response, officials at the Navy Finance Center contacted officials at the Civil Service Commission by telephone and were advised that: (1) the member's military service was included in the computation of his Civil Service annuity which was effective March 1, 1970; (2) upon his death, the Civil Service survivor annuity payable to his widow also included such service in its computation; (3) according to the records of the Bureau of Medicine and Surgery, Navy Department, Washington, D.C., the disability for which the member was militarily retired was not combat-incurred nor caused by an instrumentality of war; and (4) the member did not require the use of his military service in order to qualify for Civil Service retirement. Written confirmation of this information was furnished the Navy Finance Center by letter dated August 18, 1975,

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which also advised that it previously had been the policy of the Civil Service Commission to automatically include a member's military service in the computation of the Civil Service annuity if his military retired pay had been waived, regardless of the reason for the waiver.

The submission also states that a request that the purpose of his waiver be changed to show that his retired pay was waived for Civil Service benefits, rather than for Veterans Administration compensation, was never submitted to the Navy Finance Center by the member. Therefore, insofar as the Navy's records were concerned, a waiver for Veterans Administration compensation was in effect at the time of his death. In addition, had such compensation been discontinued or reduced to an amount less than his retired pay entitlement prior to his death, his retired pay would have been reinstated accordingly.

The submission further states that 10 U.S.C. 1450(d) provides that an SBP annuity is not payable if, at the time of a member's death, a waiver is in effect for the purpose of including military service in the computation of Civil Service annuity benefits and, in addition, he had elected to participate in the Civil Service survivor annuity program. In this regard, it is pointed out that our decision, 53 Comp. Gen. 857 (1974), held that SBP costs in such cases need not be deposited during the period such waiver is in effect. It is also stated that because of the absence of a request that his retired pay be waived for Civil Service purposes, it is questionable as to whether section 1450(d) is applicable in the present case, since our decision 41 Comp. Gen. 460 (1962) held that a member who was unable to gain title to Civil Service benefits without the inclusion of his military service must be regarded as having actually or constructively waived or relinquished his right to receive retired pay in order to receive the increased Civil Service annuity. However, it is noted that the circumstances of that case differ from those in the present case in that the inclusion of the member's military service was not necessary in order to establish his eligibility for Civil Service retirement benefits.

Finally, the submission states that if it is determined that a waiver for Civil Service annuity benefits was in effect at the time of the member's death, then it would appear that Mrs. Whaley would be entitled to a refund of SBP costs remitted by her husband since November 1, 1972. Conversely, if it is held that no such

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waiver existed, Mrs. Whaley would be entitled to retired pay due and payable for the month of her husband's death as well as to SBP annuity payments commencing December 5, 1973, less offsets for Dependency and Indemnity Compensation and Social Security benefits, if applicable. In turn, however, not only would Mrs. Whaley's Civil Service survivor annuity require a recomputation to exclude credit for her husband's military service but it appears that a portion of the Civil Service survivor annuity already paid to her based on his military service would constitute an overpayment by the Civil Service Commission. In such circumstances, it would also appear that the Civil Service annuity received by the member from March 1, 1970, until December 4, 1973, would appear to be excessive in that the basic computation of the annuity should not have included credit for his military service.

Subsection 1450(d) of title 10, United States Code (Supp. II, 1972), provides as follows:

"(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(i) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title."

Subsection 1452(e) of title 10, United States Code (Supp. II, 1972), provides as follows:

"(e) When a person who has elected to participate in the Plan waives his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect unless, in accordance with section 8339(i) of title 5, he has notified the Civil Service Commission that he does not desire any

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spouse surviving him to receive an annuity under section 8341(b) of title 5."

As it is indicated in the submission, subsection 1450(d) precludes the payment of an annuity under the SBP when a retired member has in effect a waiver of retired pay for the purpose of including his military service in the computation of his Civil Service annuity, unless he specifically notifies the Civil Service Commission that he does not desire a survivor annuity under that retirement system. Also, under the provisions of 10 U. S. C. 1452(e) while a retired member has a waiver of retired pay in effect for Civil Service retirement purposes and has not notified the Civil Service Commission that he does not desire coverage under the Civil Service survivor annuity plan, premium deposits are not necessary under the SBP. This in effect provides coverage for his survivor under the Civil Service program.

We have consistently taken the position that what constitutes creditable service for purposes of the Civil Service Retirement Act is a matter primarily for determination by the Civil Service Commission. See, e.g., 41 Comp. Gen. 460, supra. Civil Service Regulations provide that credit is not allowed for military service if the employee is receiving retired pay awarded for a nonservice-connected disability. 5 C.F.R. 831.301 (1969) through (1975). The Civil Service Commission interprets this regulation as providing for crediting military service if the employee is not receiving military retired pay. No specific statement is required as to the purpose of a waiver of retired pay if such waiver is in effect. If the member has a waiver in effect which under Civil Service Commission procedures permits payment of a Civil Service annuity based upon his military service and no declaration of survivor coverage under that system was executed we do not believe that he can also be covered under the SBP. However, it is to be noted that in this case the record shows that by letter dated December 19, 1969, addressed to the Civil Service Commission, the member stated that it was his intention to waive his military retired pay for the purpose of having his Civil Service annuity computed on the basis of his total Federal employment.

In these circumstances, we must conclude that since on the date of his death, the member had in effect a waiver of retired pay which permitted increasing his Civil Service annuity based on

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his military service, he was not entitled to coverage under the SBP. Accordingly, Mrs. Whaley is not eligible for an SBP annuity. However, she is entitled to a refund of the personal remittances made by the member to cover the costs of the SBP annuity for the period November 1, 1972, to December 31, 1973. See 53 Comp. 857, supra.

[Deputy

R.F. KELLER

Comptroller General
of the United States